Office Supreme Court
FILED
SEP 10 19
CHARLES ELMORE C

FILE COPY

No. 282

In the Supreme Court of the United States

OCTOBER TERM, 1930

BONWIT TELLER & COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presenetd	1
Statute involved	2
Statement	3
Discussion	5
Conclusion	6

CITATIONS

Cases:	
Arnson v. *Murphy*, 109 U. S. 238	6
Arnson v. *Murphy*, 115 U. S. 579	6
Finn v. *United States*, 123 U. S. 227	6
Tucker v. *Alexander*, 275 U. S. 228	5
United States v. *Kaufmann*, 96 U. S. 567	5
United States v. *Savings Bank*, 104 U. S. 728	5
Statute:	
Revenue Act of 1926, Sec. 1113 (a), c. 27, 44 Stat. 9, 116	2-3

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 282

BONWIT TELLER & COMPANY, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES

The United States does not oppose the issuance of the writ in this case.

OPINION BELOW

The opinion of the Court of Claims (R. 18) is reported in 39 F. (2d) 730.

JURISDICTION

The judgment sought to be reviewed was entered on April 14, 1930. (R. 30.) The petition for certiorari was filed on July 9, 1930. (R. 30.) The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925.

QUESTION PRESENTED

1. Whether the determination of the Commissioner of Internal Revenue that a sufficient claim for refund of taxes had been filed is reviewable by the courts at the instance of the United States, and

if reviewable, whether the particular facts of this case establish that a claim for refund was filed.

2. Whether the provisions of Section 1113 (a) of the Revenue Act of 1926 are applicable to a case in which the Commissioner has allowed a claim for refund and has approved and scheduled to the Collector of Internal Revenue a certificate of overassessment.

STATUTE INVOLVED

Section 1113 (a) of the Revenue Act of 1926, c. 27, 44 Stat. 9, 116, provides as follows:

> Section 3226 of the Revised Statutes, as amended, is reenacted without change, as follows:
>
> "SEC. 3226. No suit or proceeding shall be maintained in any court for the recovery of any internal-revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected until a claim for refund or credit has been duly filed with the Commissioner of Internal Revenue according to the provisions of law in that regard and the regulations of the Secretary of the Treasury established in pursuance thereof; but such suit or proceeding may be maintained whether or not such tax, penalty, or sum has been paid under protest or duress. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commis-

sioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum unless such suit or proceeding is begun within two years after the disallowance of the part of such claim to which suit or proceeding relates. The Commissioner shall, within 90 days after any such disallowance, notify the taxpayer thereof by mail."

STATEMENT.

On July 14, 1919, the petitioner filed its income and profits tax return for the fiscal year ending January 31, 1919, and paid the taxes shown thereon on July 14, 1919, and December 13, 1919. (R. 13.) The Commissioner of Internal Revenue found and on November 19, 1924, advised the petitioner that the tax paid on this return was $10,866.43 in excess of the correct tax liability. (R. 14.) The period of limitations then in force for the filing of a claim for refund had expired. By the Act of March 3, 1925, c. 435, 43 Stat. 1115, the period was extended to permit a refund or credit if a claim therefor was filed prior to April 1, 1926, upon certain conditions not here material.

The taxpayer, having been advised of the overpayment, and having been furnished by the Commissioner a form of waiver for filing, on May 23, 1925, filed the waiver which was accepted by the Commissioner. (R. 15.) No formal claim for refund was then filed. Some official of the Bureau

of Internal Revenue marked the letter returning the waiver as follows (R. 17):

> Inferential demand for the refund upon basis of the schedule sent taxpayer under date November 19, 1924 (IT:CR:A:JML). Rules and Regulations, Mulligan.

On February 9, 1927, the Commissioner of Internal Revenue advised the petitioner that a claim for refund on proper form should be filed. (R. 15.) On February 19, 1927, such a formal claim was filed. (R. 16.)

A certificate of overassessment for $10,866.43 was prepared and on March 8, 1927, the Commissioner allowed the claim and approved the certificate of overassessment. (R. 17.) The Collector, however, credited $9,846.06 of the allowed amount against an unpaid assessment for the year 1917. (R. 17.) A check was issued to the petitioner for the balance, with interest. (R. 17.) The petitioner protested against this credit upon the ground that the collection of the unpaid assessment for 1917 was barred, and accordingly, it did not cash the check, but held it and offered to apply it against the present claim. (R. 17.)

The petitioner thereupon brought this suit, claiming $10,866.43. The respondent answered and counterclaimed for the amount of the payment covered by the check upon the ground that it constituted an unauthorized refund of money, as no claim for refund had been filed within the time prescribed by law. (R. 10, 11.) The court dismissed the petition and the respondent's counterclaim. (R. 30.)

DISCUSSION

I

The respondent at all times in this suit conceded that the credit of $9,846.06 against the 1917 tax was unwarranted as a collection out of time.

In the court below the Government contended that the overpayment in dispute, including the credit, was never due the taxpayer because no claim for refund was ever filed. This contention was sustained by the majority, three judges, of the court; but two judges dissented on the ground that the determination of the Commissioner that the papers filed were sufficient to constitute a claim for refund was not reviewable at the instance of the Government and on the additional ground that the Commissioner's determination was not erroneous.

There is no suggestion of fraud or mistake in this case. We submit that the reasoning of this Court in *United States* v. *Kaufman*, 96 U. S. 567, *United States* v. *Savings Bank*, 104 U. S. 728, and *Tucker* v. *Alexander*, 275 U. S. 228, if applicable to the situation in the instant case, would support the dissenting opinion, and that the question whether that reasoning is applicable is of sufficient doubt to warrant a review by this Court.

II

Although the Government did not contend in the court below that the action was barred by the provisions of Section 1113 (a) of the Revenue Act of 1926 (p. 2, *supra*), it is settled that the limitation

of such a statute goes to the jurisdiction of the court, and consequently this point may be raised at the present time. *Finn* v. *United States,* 123 U. S. 227; *Arnson* v. *Murphy,* 115 U. S. 579, 584; *Arnson* v. *Murphy,* 109 U. S. 238, 243. The tax here was paid in 1919 (R. 13), and the instant suit was not brought until 1927, more than five years after the payment of the tax (R. 5): Section 1113 (a) seems to be applicable; and if so, it would bar the present action. We are not aware of any case in which the question as to the applicability of this section to a situation similar to that involved in the case at bar has been discussed, but we are advised that this point will be raised in many cases which are now pending.

CONCLUSION

For the reasons stated above, we do not oppose the issuance of the writ in this case.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
BRADLEY B. GILMAN,
GEORGE H. FOSTER,
ERWIN N. GRISWOLD,
Attorneys.

SEPTEMBER, 1930.

U. S. GOVERNMENT PRINTING OFFICE: 1930